

detained under the aforesaid two Acts, that the application for a *subpoena* addressed to the Prime Minister to produce all documents relating to all such detainees was clearly vexatious. The fact that it was sought to *subpoena* the Prime Minister when he was not in law the Minister charged with the responsibility of administering these two Acts seems to me clear evidence that the application was vexatious.

Several other grounds were raised in the petition of appeal but at the hearing of the appeal no arguments were presented by counsel for the appellant in support and in my judgment there is no substance in any of them.

Lastly, it is contended that the sentence was manifestly excessive and reliance is placed upon the fact that some consideration ought to have been given because the defamatory words were spoken during an election campaign speech. It is to be observed that at the trial the defence was one of justification and the appellant in his sworn testimony continued to assert the truth of the imputations he had made. In my judgment, the trial judge was justified in imposing a sentence of six months and for all these reasons the appeal against conviction and sentence is dismissed.

*Appeal dismissed.*

Solicitors: *Harbans Singh & Kamil.*

## A MALAYSIAN REPORTS

### YEO KIAN ANN & SON v. RAILWAY ADMINISTRATION

[O.C.J. (Mohamed Azmi J.) May 24, 1972]

[Kuala Lumpur — Civil Suit No. 1892 of 1968]

**B** *Railway Administration — Requirement of notice by plaintiff or his solicitor before commencement of action — Strict interpretation — Common law liability of railway administration — Railway Ordinance, 1948, ss. 37 & 77(2).*

*Tort — Negligence — Railway train — Private level crossing — Common law liability.*

**C** In this case the plaintiffs claimed damages against the Railway Administration for loss sustained as a result of a collision between their motor-lorry and a train at a private level crossing. The Railway Administration raised two preliminary objections to the claim (1) that no notice of the claim had been given by the plaintiff or his solicitors as required by section 77(2) of the Railway Ordinance, 1948; (2) that as section 37 of the Railway Ordinance did not impose any liability on the Railway Administration as far as private level crossings were concerned, the Railway Administration was also not obliged to do anything at common law. It appeared that in this case a written notice was served by the solicitors for the insurance company, who were the insurers of the lorry belonging to the plaintiffs.

**Held:** (1) the written notice in this case was not served by the plaintiffs or their solicitors and therefore did not constitute a proper notice as required by section 77(2) of the Railway Ordinance, 1948;

**E** (2) although section 37 of the Railway Ordinance is silent as regards the obligation of the Railway Administration towards members of the public, this did not relieve them for their common law obligation to take care.

*Cases referred to:-*

(1) *Thakur Das v. E.I. Ry. Co.* A.I.R. 1926 All 686.

(2) *Dominion of India v. Hazari Lal and another* A.I.R. 1949 Pat. 410.

**F** (3) *Union of India v. Kalinga Textiles Private Ltd. Co. and another* A.I.R. 1969 Bom. 401.

(4) *Lickiss v. Milestone Motor Policies* [1966] 2 All E.R. 972.

## CIVIL SUIT.

*C. T. Chan* for the plaintiffs.

**G** *Morris Edgar (P. Rajasingham with him)* for the defendants.

**H** **Mohamed Azmi J.:** The plaintiffs who are a firm of contractors and general merchants at Klang claimed damages against the Railway Administration for loss sustained as a result of a collision between their motor lorry BR 1942 and a train on June 10, 1968 at about 10.45 a.m. at a private level crossing at Sungei Rengam Estate. In the pleading it was alleged by the plaintiffs that the collision which had caused severe damage to their motor lorry was due entirely or was substantially contributed to by the negligence of the Railway Administration, their servants or their agents. Alternatively, they alleged that the said collision was caused by the breach of statutory duty of the defendants, their servants or agents. The private level crossing was constructed under the provisions of section 37 of the Railway Ordinance, 1948 at the request of the Sungei Rengam Estate, Highlands Malaya Plantations Ltd. for the purpose of giving access to the estate.

**I** In paragraph 6 of their further amended statement of defence, the Railway Administration contend-

ed that the plaintiffs' claim should be dismissed by reason of the plaintiffs' failure to serve written notice as required under section 77(2) of the Railway Ordinance which provides:

"No suit or action shall be commenced against the Railway Administration until at least one month after written notice of intention to commence the same has been served upon the Railway Administration by the plaintiff or by his advocate and solicitor or agent. In such notice the cause of action and details of claim shall be clearly and explicitly stated."

It was conceded by counsel for the plaintiffs that if the above statutory provision had not been complied with, then it was the end of the plaintiffs' case. That failure to serve statutory notice on the Railway Administration is fatal to a claim for any loss to property appears to have been established in *Thakur Das v. E. I. Ry. Co.*<sup>(1)</sup>; *Dominion of India v. Hazari Lal & Anor.*<sup>(2)</sup>; and *Union of India v. Kalinga Textiles Private Ltd. Co. & Anor.*<sup>(3)</sup>. This issue was therefore heard as a preliminary objection. After hearing evidence adduced by the plaintiffs and considering the submissions made by counsel for both parties, I came to the conclusion that the plaintiffs had failed to comply with section 77(2) and accordingly I dismissed the plaintiffs' claim with costs.

Under the provisions of section 77(2), the written notice of intention to commence a suit against the Railway Administration —

- (i) must be served on the Railway Administration at least one month before a writ is filed in court;
- (ii) must be served by the plaintiffs or by their advocate and solicitor or agent; and
- (iii) must clearly and explicitly state the cause of action and details of claim.

In this case, it was common ground that requirements (i) and (iii) had been fulfilled; and the only issue was requirement (ii), i.e. whether the written notice had been served on the Railway Administration by the proper party. The letter dated July 1, 1968 (Exhibit D2), which was purported to constitute the written notice, was sent to the Manager of the Railway Administration by Messrs. Joseph & Son, a firm of advocates and solicitors, on behalf of Messrs. Safety Insurance Co. Ltd., the insurers of motor lorry BR 1942. On July 4, 1968 the Railway Administration replied to the said letter stating that the matter had been referred to the insurers of Sungei Rengam Estate, namely Messrs. Edward Lumley & Sons (see Exhibit P1); and on October 18, 1968 the plaintiffs filed the writ in connection with the present proceedings. There was nothing in Exhibit D2 to suggest that Messrs. Joseph & Son were acting as advocates and solicitors or agents of the plaintiffs. Nor was there any mention that the plaintiffs had been indemnified by the Safety Insurance Co. Ltd. and that both the insurers and the plaintiffs had agreed that the insurance company should proceed against the Railway Administration by subrogation. On the contrary, Messrs. Joseph & Son did express in no uncertain terms that the letter was sent on behalf of Safety Insurance Co. Ltd. Although it might be true that the Safety Insurance Co. Ltd. were the actual plaintiffs in this case, the fact remained that the only plaintiffs on record are Yeo Kian Ann & Son. The

first occasion that Messrs. Joseph & Son did indicate that they were acting for the plaintiffs was contained in their letter addressed to Messrs. Edward Lumley & Sons dated August 23, 1968 (Exhibit P5), a copy of which was not extended to the Railway Administration. From the evidence of Enche Mohamed Yusof, the Chief Administrative Officer, Malayan Railway, a witness called by the plaintiffs, the Railway Administration had never received any notice under section 77 of the Railway Ordinance, and under re-examination he testified that Messrs. Edward Lumley & Sons referred to in Exhibit P1, i.e. the reply to Exhibit D2, were the insurers of Sungei Rengam Estate and he expected Messrs. Joseph & Son would communicate with the estate insurers direct. Under the circumstances, there was no evidence on which it could reasonably be inferred that Edward Lumley & Sons were the agents of the Railway Administration, and it was therefore my considered opinion that Exhibit P5 could not properly constitute a written notice or part of such notice as required under section 77(2). In any event, no evidence was adduced whether the Railway Administration was even aware of Exhibit P5.

Learned counsel for the plaintiffs relied on the case of *Lickiss v. Milestone Motor Policies*<sup>(4)</sup> where the insurers were notified of the accident by the police instead of by the insured as required by the policy. It was held by the Court of Appeal that notice by the police was sufficient although it was a condition in the insurance that the notice should be given by the insured. In my view, *Lickiss'* case is distinguishable in that the notice there was required to be given by a particular party under the terms of a contract; whereas in the present case, that requirement is provided by statute. It is necessary to observe that what had to be considered were the plain terms of section 77(2) of the Railway Ordinance as enacted by the legislature. Where the terms of the statute do not admit of any ambiguity, it is the clear duty of the court to construe the plain terms of the statute and give them their legal effect. As stated earlier, the written notice under section 77(2) must be given by the plaintiffs or their advocate and solicitor or agent; and since Exhibit D2 was not served on the Railway Administration by any of these persons, I found that it did not constitute a proper notice as required by that section. The plaintiffs' claim was accordingly dismissed with costs.

There is one other matter that should be dealt with in this case. It concerns another preliminary objection which had earlier on been raised by the Railway Administration. They contended that unlike sections 36 and 38 of the Railway Ordinance which dealt with public level crossings and occupation crossings respectively, section 37 of the Railway Ordinance did not impose any statutory duty on the Railway Administration as far as private level crossings were concerned. It was therefore argued that as there was a statutory provision under which they were not legally obliged to do anything, they were also not obliged to do anything at common law. In my view, there appears to be no merit in this argument. The fact that section 37 is silent as regards their obligation towards members of the public does not mean that they are relieved from their common law obligation to take

care. As stated by *Halsbury's Laws of England*, Third Edition, volume 36, page 450:

"The imposition on a person of a statutory duty does not necessarily absolve him from his liability for negligence in relation to the same matter, and he may by his conduct be in breach both of his statutory duty and of his common law duty."

Undertakers of public transport, such as the Railway Administration, are required at common law to conduct their affairs with reasonable care and diligence. They are under obligation to take all reasonable precautions to avert danger; the greater the danger, the more the precaution. To my mind, a reasonable interpretation of section 37 does not suggest that the legislature intended the Railway Administration to be totally exempted from liability to foreseeable users of private crossings even if an accident occurs as a result of the Railway Administration's own negligence or the negligence of their servants or agents. Section 37 is procedural in nature. It relates essentially to the construction, cost and maintenance of private crossings. Unless it is expressly provided, there cannot be read into the section the intention of the legislature to do away with their common law duty to take care. I am therefore inclined to the view that the Railway Administration's preliminary objection on this point should not be upheld.

*Order accordingly.*

Solicitors: *Joseph & Son; Morris Edgar & Co.*

### MURTHI v. ANNAPOORANI

[O.C.J. (Mohamed Azmi J.) May 26, 1972]

[Kuala Lumpur — Civil Suit No. 1843 of 1968]

*Contract — Act done for benefit of another — Claim for compensation — Contracts (Malay State) Ordinance, 1950, s. 71.*

The plaintiff claimed compensation for services rendered to the defendant in respect of the subdivision of the defendant's undivided share in a piece of land. The plaintiff was entitled to the balance of the share in the land. The plaintiff's husband became interested to develop the plaintiff's land and by an agreement the plaintiff and defendant agreed to have the whole land surveyed and subdivided. No provision was made for payment of expenses in the agreement. The whole land was eventually subdivided into thirty eight lots, each with a separate title. Thirteen of the lots were registered in the plaintiff's name, twenty four in the defendant's name while one lot was surrendered to the State Government as road reserve. Subsequently the plaintiff was induced by her husband to bring the claim for compensation against the defendant.

**Held:** (1) although the plaintiff's act in this case was lawful and was such that the defendant enjoyed the benefit of it, the evidence showed that it was not done for the defendant. The dominant and sole motive of the plaintiff's husband in this case was to benefit himself and his wife in the housing project;

(2) the evidence showed that it was the intention of the plaintiff to carry out the subdivision of the land gratuitously;

(3) in the circumstances as the plaintiff had failed to satisfy the conditions of section 71 of the Contracts (Malay States) Ordinance, 1950, her claim must be dismissed.

#### A Cases referred to:-

(1) *Siow Wong Fatt v. Susor Rotan Mining Ltd.* [1967] 2 M.L.J. 118 at p. 120.

(2) *Ganapathi Bhatta v. Sanna Sedu Beari A.I.R.* (1930) Mad. 644.

#### CIVIL SUIT.

*R. Ponnudurai* for the plaintiff.

B *R. R. Sethu* for the defendant.

**Mohamed Azmi J.:** This is a claim for \$11,843.28 by the plaintiff as compensation for services rendered to the defendant in respect of the sub-division of the defendant's undivided share in a piece of land in the District of Klang under section 71 of the Contracts (Malay States) Ordinance, 1950.

C The facts of this case can be briefly stated as follows. The defendant was the registered owner of 2½ acres of agricultural land held under E.M.R. No. 6186 Lot No. 1796 in the District of Klang. When the plaintiff, who is the niece and adopted daughter of the defendant, got married to Deputy Superintendent of Police Sambanathan Murthi in 1953, the defendant agreed to give her one acre of her land. In pursuance to the said promise, the defendant entered into a written agreement with the plaintiff dated May 20, 1964. (See page 1 of the agreed bundle of documents). Under this May agreement, the defendant agreed to transfer one acre of her Klang land to the plaintiff for love and affection, and under clause 4, the plaintiff undertook "to indemnify the transferor (defendant) against any expenses that may be incurred as a result of such sub-division or of obtaining separate title for the land transferred...". One acre of the defendant's land was eventually transferred to the plaintiff, but as no sub-division was done, their shares remained undivided in the land — the plaintiff being entitled to 4/11 and the defendant to 7/11. In the meantime, the D.S.P. became very interested to develop his wife's portion of the land, and by an agreement dated October 28, 1964, the plaintiff and the defendant agreed to have the whole land surveyed, sub-divided, and to obtain separate titles. In pursuance to clause 3 of the October agreement, the defendant also executed on the same day a power of attorney in favour of the plaintiff. (See pages 3 to 5 of the agreed bundle of documents). Under clause 2 of the October agreement, it was agreed by the parties that "all expenses incidental to the survey, sub-division and obtaining of separate titles shall be borne by both parties in proportion to the respective share of the land each owns", and clause 6 provides that "should the first party (the defendant) find it necessary to raise money to sub-divide, survey and develop the land and for that purpose deem it necessary to sell a portion of her land, in such event she shall give the second party (the plaintiff) the first opportunity of purchasing that portion of the land from her". However, these two clauses were deleted at the request of the defendant and, as such, there was no provision in the October agreement under which the defendant could be made contractually liable to pay anything to the plaintiff. Clause 3 of the power of attorney under which the plaintiff is authorised to develop the defendant's land was also amended to "obtaining separate titles". In any event, whilst the de-